STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 10, 2007
v	No. 265385 Antrim Circuit Court
SALVADOR ROBERT MARTIN, Defendant-Appellant.	LC No. 04-003780-FC

Before: Neff, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a, first-degree home invasion, MCL 750.110a(2), and conspiracy to commit first-degree home invasion, MCL 750.157a. Defendant was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 270 to 810 months for the armed robbery and the conspiracy to commit armed robbery convictions and 117 to 351 months for the first-degree home invasion and conspiracy to commit first-degree home invasion convictions, with 182 days' credit for time served. Defendant appeals as of right his conviction and sentence. We affirm.

In February 2004, defendant, his brother Aaron Martin, and Charles (C.J.) Henry barged into the victim's home and demanded, at gunpoint, the victim's stock of homegrown marijuana. During the ordeal, the victim was pistol-whipped by Henry, punched by Aaron and defendant, and repeatedly threatened with death if he called the police. When the three men had taken everything, the marijuana and money, they made the victim stand bleeding on the front porch in his pajama bottoms and bare feet until they left.

Defendant first argues that he received ineffective assistance of counsel because his replacement counsel never renewed his original counsel's motion to suppress the victim's identification of defendant at his first preliminary examination. We disagree.

> To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's

performance constituted sound trial strategy. [*People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003), citations omitted.]

Between defendant's original bindover and the prosecutor's motion for a second preliminary examination, Henry and Aaron pleaded guilty to various charges in return for their testimony in this case. On the day set for a second preliminary examination, defendant did not appear at the courthouse and again failed to appear on the day set for defendant's motion to quash the bindover and suppress the victim's identification of him. After defendant's subsequent arrest, the district court held a second preliminary examination and took the testimony of defendant's two accomplices, who clearly identified defendant as the third individual at the scene. Although defendant's replacement counsel could have challenged the victim's identification of defendant at the first preliminary examination, this tack would have left the jury to hear only those identifications that were concrete and absolute: the identification by defendant's brother and his long-time friend. By bringing to light the victim's problems identifying each of the culprits, defense counsel could raise suspicion and doubt among the jurors about whether defendant was actually participating in the crime or whether the other two robbers were falsely accusing him to receive leniency. Under the circumstances, we are not persuaded that defendant's replacement counsel was performing ineffectively rather than strategically. *Id*.

Moreover, defendant's argument strains to suggest that the victim did not have any independent basis for identifying defendant and asserts that the identification derived from the suggestion of a detective who told the victim, well after the corporeal lineup, the number that represented defendant. The victim originally narrowed down a photographic array to defendant and one other individual and then picked out defendant from a randomly arranged group of spectators at the preliminary examination. Later, the other two robbers verified his testimony that he had an extensive, unobstructed face-to-face encounter with defendant. Under the circumstances, defendant fails to persuade us that the victim's identification at the examination was the product of an unduly suggestive procedure. *People v Carter*, 415 Mich 558, 599-600; 330 NW2d 314 (1982). Although the victim's identification was far from perfect, weighing those imperfections is generally a matter for the jury, so the judge would most likely have denied the motion anyway. *People v Barclay*, 208 Mich App 670, 676; 528 NW2d 842 (1995). An attorney is not required to file meritless motions. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next argues that the trial court's sentence relied on facts that the jury did not find beyond a reasonable doubt, so his sentence violated the principle adopted in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, in *People v Drohan*, 475 Mich 140, 159-160, 164; 715 NW2d 778 (2006), our Supreme Court clarified that *Blakely* does not apply to the minimum sentence of intermediate sentencing schemes like the one Michigan uses, so defendant's argument fails.

Finally, defendant argues that the trial court erred by scoring offense variable seven (OV 7) at fifty points. We disagree. A trial court's discretionary scoring decisions should be upheld if there is any evidence to support the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We find no error in the trial court's decision that placing a gun barrel in the victim's ear, punching him, pistol-whipping him, and leaving him standing barefoot and half-naked bleeding in the cold was excessively brutal for this acquiescing victim, so we will not

disturb the trial court's score. MCL 777.37(1)(a). However, trial courts should exercise caution when scoring this variable. Its large number of "all-or-nothing" points, as well as its plain language, indicates that a score for this variable should be reserved for depraved criminal behavior that seeks gratification from unnecessarily torturing, brutalizing, or terrorizing a victim. *Id*. For example, in this case, some of the brutalizing behavior was aimed at persuading the victim to produce more money and was not necessarily designed to substantially increase the victim's fear and anxiety. Nevertheless, the evidence supported the score here because the three robbers went beyond the intimidation and brutalization necessary to complete their crime.

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Christopher M. Murray